Re Chan Peck Heay & Anor; ex parte Goodyear Malaysia Bhd

HIGH COURT (KUALA TERENGGANU) — BANKRUPTCY NOS 29–213 OF 1992 AND 29–214 OF 1993
NIK HASHIM J
14 APRIL 2002

Bankruptcy *— Notice — Application to set aside — Judgment debtor filed affidavits under r 95 of the Bankruptcy Rules 1969 as an application to set aside the bankruptcy notice — Whether judgment debtor's application was procedurally correct to invalidate the bankruptcy notice — Whether r 18 of the Bankruptcy Rules 1969 was applicable*

This was an appeal by the judgment debtor ('the JD') against the decision of the senior assistant registrar in dismissing the JD's application to set aside the bankruptcy notice ('the BN') taken against her by the judgment creditor ('the JC') on the ground that the amount claimed by the JC exceeded the amount actually due as stipulated in the sessions court judge's grounds of decision. In the grounds of decision, the sessions court stated that interest was payable from the date of judgment, that is, 22 November 1992. However, the sealed judgment stipulated that the JD was required to pay interest from 7 April 1987. According to the JD, the JC had wrongfully claimed interest from 7 April 1987 to 22 November 1992. The BN was served on JD on 14 August 1993 and on the following day, the JD filed a notice pursuant to s 3(2)(ii) of the Bankruptcy Act 1967. On 17 August 1993, the JD filed affidavits under r 95 of the Bankruptcy Rules 1969 ('the Rules') as an application to set aside the BN.

Held, dismissing the appeal:

(1) The claim for the excess of interest was unfair and such claim would cause a miscarriage of justice if the JD were not allowed to go behind the sealed judgment (see p 374G–H).

(2) There are only two ways to challenge a BN, namely, under r 95 or r 18 of the Rules. In the Rules, the only instance where the filing of an affidavit can be treated as an application for the purpose of setting aside a BN is under r 95(1) of the Rules. As such, a debtor who seeks to challenge the validity of a BN under r 95(1) must be able to show that he has a counterclaim, set-off or cross-demand which is equal to or exceeded the amount of the judgment debt which he could not set up in the action in which the judgment was obtained. In every other instance, where there is a need to obtain the decision of the court, an application is necessary and the application, according to r 18 of the Rules has to be in the form of a summons-in-chambers supported by an affidavit (see p 375D–F).

(3) Consequently, where the debtor seeks to set aside a BN on the ground that it required him to pay a judgment debt otherwise

than in accordance with the terms of the judgment, the debtor must make the application in accordance with r 18 of the Rules (see p 375F–G). A

(4) In the instant case, the JD's application should have been made under r 18 of the Rules. The provisions of r 18 were mandatory and the JD's failure to follow r 18 was fatal. The procedure adopted by the JD was not procedurally correct (see pp 375H, 376A). B

[Bahasa Malaysia summary

Ini merupakan rayuan penghutang penghakiman ('JD') ke atas keputusan penolong pendaftar kanan menolak permohonan JD untuk mengenepikan notis kebankrapan ('NK') yang dikeluarkan terhadapnya oleh pemiutang penghakiman ('JC') memandangkan jumlah yang dituntut oleh JC melebihi jumlah yang sebenarnya perlu dibayar seperti distipulasikan dalam alasan penghakiman hakim mahkamah sesyen. Dalam alasan penghakiman, mahkamah sesyen mengatakan bahawa faedah perlu dibayar dari tarikh penghakiman, iaitu 22 November 1992. Walau bagaimanapun penghakiman yang termeterai mengatakan JD perlu membayar faedah mulai 7 April 1987. Menurut JD, JC telah membuat satu kesalahan menuntut faedah mulai 7 April 1987 sehingga 22 November 1992. NK tersebut telah diberikan kepada JD pada 14 Ogos 1993 dan pada hari berikutnya, JD telah memfailkan notis dibawah s 3(2)(ii) Akta Kebankrapan 1967. Pada 17 Ogos 1993, JD memfailkan afidavit di bawah k 95 Kaedah Kebankrapan 1969 ('Kaerah tersebut') sebagai permohonan untuk mengenepikan NK. C D E

Diputuskan, menolak rayuan: F

(1) Tuntutan untuk faedah yang melebihi adalah tidak adil dan tuntutan sebegini membawa kepada salah laksana keadilan jika JD tidak dibenarkan untuk memeriksa sejarah penghakiman yang termeterai itu (lihat ms 374G–H).

(2) Hanya terdapat dua cara untuk mencabar NK, iaiu di bawah k 95 ataupun k 18 Kaedah. Di dalam kaedah, pemfailan afidavit hanya dapat dianggap sebagai permohonan bagi maksud mengenepikan NK adalah di bawah k 95(1) Kaedah tersebut. Oleh itu, seorang penghutang yang ingin mencabar kesahan NK di bawah k 95 seharusnya boleh menunjukan bahawa dia mempunyai tuntutan balas, set off ataupun demand balas yang sama dengan ataupun melebihi jumlah penghakiman yang ia tidak dapat membentangkan dalam tindakan di mana penghakiman tersebut diperolehi. Dalam setiap kes lain, jika wujudnya keperluan untuk mendapatkan keputusan mahkamah, satu permohonan adalah perlu dan permohonan tersebut, mengikut k 18 Kaedah tersebut harus di buat dalam bentuk saman dalam kamar yang disokong oleh afidavit (lihat ms 375D–F). G H I

(3) Memandangkan sedemikian, di mana penghutang menuntut untuk mengenepikan NK atas alasan yang ia menghendakinya membayar suatu hutang penghakiman selain daripada menurut terma penghakiman, penghutang mesti membuat permohonan mengikut k 18 Kaedah tersebut (lihat ms 375F–G).

(4) Dalam kes ini, permohonan JD seharusnya dibuat di bawah k 18 Kaedah tersebut. Peruntukan k 18 adalah mandatori dan kegagalan JD untuk mengikut k 18 adalah satu kegagalan yang serius. Prosedur yang diikuti oleh JD adalah dari segi prosedurnya salah (lihat ms 375H, 376A).]

Notes

For cases on application to set aside a notice, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1708–1724.

Cases referred to

Chew Chee Sun, Re; ex p Chan Theam Soon [2000] MLJU 397 (refd)
Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298 (refd)
Development & Commercial Bank Bhd v Datuk Ong Kian Seng [1995] 2 MLJ 724 (refd)
J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd [2000] 3 MLJ 177 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 3(1), (2)(ii)
Bankruptcy Rules 1969 rr 18, 94(1)(b), 95

Khalid Mohamad (*Rithauddin & Azlin*) for the judgment debtor.
T Sudharsanan (*Shook Lin & Bok*) for the judgment creditor.

Nik Hashim J: There are two appeals before the court and both of them raise identical issues. In the circumstances, the parties have agreed that the decision in respect of encl 33A (No 29–213–93) bind the parties in respect of encl 27A (No 29–214–93). The court acceded to the agreement.

The appellant judgment debtor ('the JD') appealed against the decision of the learned senior assistant registrar given on 20 February 2001 dismissing the JD's application to set aside the bankruptcy notice ('the BN') that the judgment creditor ('the JC') had taken out against her.

In this case, it is pertinent to note the difference between the terms of the grounds of decision and the terms of the sealed judgment of the sessions court Kuala Terengganu given on 22 November 1992 vide summons No 24–147–1987. The terms of the grounds of decision of the learned judge read as follows:

> Setelah meneliti keseluruhan dan penyata-penyata yang dikemukakan, Mahkamah mendapati pihak plaintif telah berjaya mengasaskan tuntutan mereka terhadap defendan. Dengan itu, tuntutan plaintif terhadap defendan bagi jumiah RM67,099.21 dibenarkan dengan faedah 8% setahun *daripada tarikh penghakiman* hingga tarikh penyelesaian dan kos.

Whereas the terms of the sealed judgment upon which the BN was founded, however, state the commencement of the date of interest differently as follows:

> ... bahawa defendan hendaklah membayar kepada plaintif jumlah sebanyak RM67,099.21 dengan faedah ke atasnya pada kadar 8% setahun *daripada 7 April 1987* sehingga ke tarikh pembayaran sepenuhnya dan kos RM9,697. (Emphasis added.)

Thus, according, to the JD, the amount of interest that was wrongfully claimed for a period of $5^1/_2$ years more (from 7 April 1987 to 22 November 1992) under the BN amounted to RM29,523.67, a substantial sum, substantial enough to invalidate the BN in this case.

The BN was served on the JD on 14 August 1993. On 15 August 1993, the JD filed a notice pursuant to proviso (ii) to s 3(2) of the Bankruptcy Act 1967 ('the Act') alleging that the BN was invalid by reason that the sum specified in the BN as the amount due exceeds the amount actually due to the JC. On 17 August 1993, the JD filed an affidavit (encl 3A) and on 17 August 1994, a further affidavit (encl 20A) was filed, both under r 95 of the Bankruptcy Rules 1969 ('the Rules') as an application to set aside the BN on the grounds, first, that the sum claimed was more than what was actually due to the JC and second, that the JD had a counterclaim amounting to RM47,570.89 against the JC. The second ground however, was abandoned by En Khalid. As the case stands, the JD does not have a valid counterclaim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment or order was obtained within the meaning of s 3(1) of the Act and within the meaning of r 94(1)(b) of the Rules.

With regard to the first ground, En Khalid argued forcefully that the amount demanded in the BN is not in accordance with the terms of the judgment and on the recent authority of the Court of Appeal case of *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177, the BN ought to be set aside in limine by reason of the excess, and he claimed that the procedure he adopted was correct and proper.

In my view, the claim for the excess of interest is unfair and surely, such claim will cause a miscarriage of justice if the JD is not allowed to go behind the sealed judgment. The amount of interest claimed in the sealed judgment is wrong, being more in quantum than what was actually allowed in the grounds of decision of the learned sessions court judge.

Thus, the only issue to be decided in the present case is whether the JD's application is procedurally correct to invalidate the BN.

In *J Raju*, the judgment debtor appealed against the High Court's dismissal of his application to set aside the BN issued against him by the

judgment creditor. The application by way of a summons was filed by the judgment debtor pursuant to r 18 of the Rules. Prior to the filing of the application, the judgment debtor had also, pursuant to r 95 of the Rules, applied by way of affidavit to set aside the BN. There, the BN included a demand of 'several sums of penalty interest' and a claim of 'RM80 as stamp duty', both of which are not within the terms of the judgment. There is only one issue in that case, ie it concerns the validity of the BN by reason of the said excess demands. The Court of Appeal held:

> It is a condition precedent to the exercise of bankruptcy jurisdiction, that a BN shall require a debtor to pay a judgment debt in accordance with the terms of the judgment upon which the BN is founded. On the facts, the appellant's complaint was that the BN had not been issued in accordance with the judgment and not merely that the respondent had mistakenly claimed for more than what was actually due to it. The appellant's challenge of the BN thus fell well outside the scope of proviso (ii) to s 3(2) of the Act, and was instead a jurisdictional challenge ie a separate and distinct head of challenge under s 3(1)(i) of the Act. In this respect, the appellant had sufficiently made out his complaint, and had acted in accordance with the procedure prescribed under Rule 18 of the Rules. In the circumstances, the BN was therefore a nullity as at the date of its issue.

It has been established by high authorities which bind this court that there are only two ways to challenge a BN, ie under r 95 or under r 18 of the Rules. In the Rules, the only instance where the filing of an affidavit is treated as an application for the purpose of having a BN set aside is under r 95(1) of the Rules. A debtor who seeks to challenge the validity of a BN under r 95(1) must be able to show that he has a counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt which he could not set up in the action in which the judgment was obtained. In every other instance, where there is a need to obtain a decision of the court, an application is necessary, and the application, according to r 18 of the Rules, has to be in the form of a summons-in-chambers supported by affidavit (see *Re Chew Chee Sun; ex p Chan Theam Soon* [2000] MLJU 397; *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298 (SC)).

Consequently, where the debtor is seeking to set aside a BN on the ground that it requires him to pay a judgment debt otherwise than in accordance with the terms of the judgment, the debtor must make an application in that behalf in accordance with r 18 of the Rules. The JD's challenge of the BN that it had not been issued in accordance with the terms of the judgment is outside the scope of proviso (ii) to s 3(2) of the Act and is instead a jurisdictional challenge which is a separate and distinct head of challenge under s 3(1)(i) of the Act (see *J Raju*). Therefore, the JD's application to set aside the BN should have been made under r 18 of the Rules. The provisions of r 18 are mandatory. Thus, failure to follow r 18 by the JD is fatal to her objections to invalidate the BN (see *Development & Commercial Bank Bhd v Datuk Ong Kian Seng* [1995] 2 MLJ 724 (FC)).

Applying the abovestated principles strictly to the present case, I, with respect, agree with the learned counsel Mr T Sudharsanan that the JD's application to set aside the BN, having not been made under r 18 of the

Rules, is bad and defective in law. The procedure adopted by the JD by filing a notice under proviso (ii) to s 3(2) of the Act and the filing of the affidavits (encls 3A and 20A) under r 95(1) of the Rules is not procedurally correct. The correct procedure, as was done in *J Raju*, is by way of a summons-in-chambers supported by affidavit under r 18 of the Rules.

I, therefore, hold that the affidavits (encls 3A and 20A) are not properly an application for invalidating the BN to pay a judgment debt otherwise than in accordance with the terms of the judgment. The JD has failed to comply with the correct mode of opposition to the JC's BN as prescribed under r 18 of the Rules.

Thus, for the aforesaid reasons, the appeals in Bankruptcy Nos 29–213–93 and 29–214–93 are accordingly dismissed with costs. The decisions of the learned senior assistant registrar in both appeals are hereby affirmed.

Appeal dismissed.

Reported by Lim Lee Na